In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-915

FRANCIS A. VITELLO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

The sole issue raised by the petition is whether the admission of statements of a co-conspirator who did not testify at trial violated petitioner's right to confront witnesses.

After a jury trial in the United States District Court for the District of Massachusetts, petitioner was convicted on all counts of a three-count indictment charging him with (1) conspiracy to defraud the United States by impeding and obstructing the Internal Revenue Service in the ascertainment and collection of income taxes, in violation of 18 U.S.C. 371, and (2) willfully subscribing, under penalties of perjury, to individual income tax returns for 1966 and 1967 that he did not believe to be true and correct, in violation of 26 U.S.C. 7206(1). Petitioner was sentenced to concurrent three-year prison terms on

each of the three counts, and he was fined $10,000 on the conspiracy count and $5,000 on each substantive count (II-R. 1278-1279).[1] The court of appeals affirmed (Pet. App. B).

The proof showed that, in pursuance of the conspiracy, petitioner transmitted more than $1,000,000 to Switzerland for deposit in a Swiss bank account. Thereafter, petitioner falsely attributed the funds on his 1966 and 1967 income tax returns to long-term capital gains resulting from the purchase and sale of foreign securities. These reported capital gains were entirely fictitious (Gov't Exs. 5, 6).

The details of petitioner's transfer of funds, as summarized by the court of appeals (Pet. App. B 19-22), were as follows: Petitioner was an old friend of unindicted coconspirator John W. Harris, a former special agent of the Internal Revenue Service (I-R. 333, 337-339). Petitioner advised Harris that he had substantial amounts of unreported income on which he wanted to pay tax in order to make certain that he would not be involved in a criminal prosecution (I-R. 351-352; II-R. 612). Petitioner wanted to "bring out" or legitimatize the money so as to be able to show it in his net worth (I-R. 352-353). Harris then asked a revenue officer whether he knew anyone who had any knowledge of investing in overseas stocks (II-R. 1180, 1183-1190). The revenue officer gave Harris the name of Francis Harney, who furnished the name of Douglas Mode, a Washington attorney who had knowledge about foreign investments (I-R. 364-365, 425, 433-438).

A meeting among petitioner, Mode and Harris ensued, at which time Mode offered to meet petitioner in Switzerland, where he would introduce him to a friend. Petitioner

[1] "I-R." and "II-R." refer to the two-volume appendix filed in the court of appeals.

and Harris subsequently went to Zurich, where petitioner deposited funds with a Swiss bank (I-R. 157-162, 181-182, 225, 340-348, 451-460, 466, 478; Gov't Exs. 19, 21). At Mode's request, Francis N. Rosenbaum, a Washington lawyer and a partner in the firm with which Mode had office space, telephoned his friend Walter A. Lips, an officer of the Swiss bank (I-R. 500-507, 509-512; II-R. 814, 819, 823-824, 1060-1063). Rosenbaum and Lips were both named as unindicted co-conspirators.

A meeting was held in Zurich involving petitioner, Mode, Harris, Lips, and a Dr. Burgert, a Swiss national who owned several companies and was a customer of Lips. Rosenbaum and Lips then developed a scheme whereby petitioner could report fictitious capital gains (I-R. 169-174, 448-450; II-R. 826-828, 832-834, 1028-1029, 1096-1097, 1123). They studied the prices at which European stocks had been selling and, by selecting stocks that had gone up, they drew up a schedule for petitioner's 1966 return reflecting fictitious purchases and sales of foreign stocks and a nonexistent long-term capital gain of $305,372 (II-R. 971-977; Gov't Ex. 5, pp. 9-13). Rosenbaum and Lips selected a French stock that had declined in value in 1967, and computed fictitious short sales of this stock for petitioner to report on his 1967 return. As a result, petitioner reported a nonexistent capital gain of $504,758.72 on his 1967 return (II-R. 979-986; Gov't Ex. 6, pp. 6-8).

1. Petitioner argues (Pet. 11-16) that the admission of the statements of Lips, describing the plan for petitioner to report the fictitious sales of stock, through the testimony of Rosenbaum violated his right to confront the witnesses against him because Lips was not available to testify at trial. However, the witness against petitioner was not Lips but Rosenbaum, and petitioner had every opportunity to confront him. Had the declarations of Lips been made after the conspiracy had terminated, they could have

been admitted only against Lips. See, *e.g.*, *Lutwak* v. *United States*, 344 U.S. 604; *Bruton* v. *United States*, 391 U.S. 123; and *Krulewitch* v. *United States*, 336 U.S. 440. But the statements of Lips to which Rosenbaum testified were made during the existence of the conspiracy and in furtherance of one or more of the principal objectives of the conspiracy. As a result, those declarations were properly admissible against petitioner even though he was not present at the time they were made, provided that there was independent evidence to establish that petitioner was a part of the conspiracy. *United States* v. *Nixon*, No. 73-1766, decided July 24, 1974, slip op. 16; *Fiswick* v. *United States*, 329 U.S. 211, 217; *Logan* v. *United States*, 144 U.S. 263, 308-309; see *Lutwak* v. *United States*, *supra*, 344 U.S. at 617-618; *United States* v. *Apollo*, 476 F.2d 156 (C.A. 5); *United States* v. *Honneus*, 508 F.2d 566 (C.A. 1).

It is beyond question that there was independent evidence of the existence of the conspiracy. The conspiracy began with petitioner's admission to his friend Harris that he had unreported income and that he wanted to pay the tax on that income to insure that he would not be involved in a criminal prosecution (I-R. 351-352). Petitioner also told Harris that he wanted to "bring out" the money so as to be able to show it in his net worth, and he asked Harris to find out how that might be possible (I-R. 352-353). From the evidence, the jury could have found that petitioner was engaged in a conspiracy to obstruct the lawful functions of the Internal Revenue Service by transmitting unreported income to Switzerland, where it would be beyond the scrutiny of the Internal Revenue Service. The evidence further showed petitioner's receipt of false schedules of capital gains and his

attachment of them to his income tax returns for 1966 and 1967. The conspiracy thus came full circle with petitioner initiating, participating in, and carrying to conclusion the conspiracy that existed for his benefit. There was accordingly ample evidence independent of Lips' statements to support the existence of a conspiracy.

2. Petitioner further argues (Pet. 12, 15-16) that even if the statements of Lips were admissible through the testimony of Rosenbaum, the trial judge erred in not giving the jury a limiting instruction that such statements could only be considered if it found that petitioner was part of the conspiracy between Lips and Rosenbaum. Citing *United States* v. *Apollo*, *supra*, petitioner objects to the trial judge's statement to the jury prior to Rosenbaum's testimony that the statements "would be admissible if it is found that they [Rosenbaum and Lips] are part—that not only is there conspiracy between them, but they are part of the same conspiracy with which the defendant is charged in this case" (Pet. 8, 12). Petitioner claims that the trial judge's statement did not inform the jury that Rosenbaum's testimony could only be considered if it found that petitioner was part of the conspiracy.

Contrary to petitioner's contention, the trial judge's statement fairly advised the jury that Rosenbaum's testimony could only be considered if there was independent evidence that Lips and Rosenbaum joined with petitioner in the conspiracy. But at all events, as the court of appeals pointed out, "a full and correct instruction was given later, prior to submission of the case to the jury, and the earlier instruction, while incomplete, was correct so far as it went and was consistent with defense counsel's immediate requests" (Pet. App. B 23). (See II-R. 1264.)

While the Fifth Circuit in *Apollo* required the instruction to "be given either prior to the introduction of any evidence or immediately upon the first instance of such hear-

say testimony" (476 F.2d at 163), there the trial judge not only refused to give any instruction contemporaneous with the testimony, but also stated in the presence of the jury that the "connection with conspiracy must of necessity be established by some hearsay in this kind of case" (*ibid.*). Here, however, where the trial judge's earlier instruction largely complied with the *Apollo* test, and there was ample independent evidence connecting petitioner with the conspiracy, the court of appeals correctly concluded that there was no reversible error.

It is respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

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